

Request for Reconsideration after Final Action

The table below presents the data as entered.

| Input Field | Entered |
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| SERIAL NUMBER | 86447383 |
| LAW OFFICE ASSIGNED | LAW OFFICE 116 |
| MARK SECTION | |
| MARK FILE NAME | http://tmng-al.uspto.gov/resting2/api/img/86447383/large |
| LITERAL ELEMENT | NUTRIVERUS |
| STANDARD CHARACTERS | NO |
| USPTO-GENERATED IMAGE | NO |
| ARGUMENT(S) | |
| <p>The Examining Attorney has issued a FINAL refusal for registration of the mark based on Section 2(d) on the grounds that Applicant's mark is confusingly similar to United States Registration No. 3,774,292 for NU VERUS & Design (hereafter "Cited Mark"). Applicant respectfully asserts that no likelihood of confusion exists in light of the dissimilarities between the Applicant's Mark and the Cited Mark. Applicant requests that the refusal to register be withdrawn in light of the following:</p> <p>The Examiner continues to argue that whereas the marks are compared in their entirety for similarities in appearance, sound, connotation and commercial impression, the marks contain similar elements: NUTRIVERUS and NUVERUS. The examiner states that the term "VERUS" is strong and arbitrary and that the term "NUTRI" is descriptive. <u>Applicant strongly disagrees.</u> A mark should not be dissected or split up into component parts and each part then compared with the corresponding parts of the conflicting mark to determine the likelihood of confusion.</p> <p>See TMEP 1207.01(b):</p> <p>"The Court of Appeals for the Federal Circuit has provided the following guidance for</p> | |

evaluating the marks:

The basic principle in determining confusion between marks is that marks must be compared in their entireties and must be considered in connection with the particular goods or services for which they are used. It follows from that principle that likelihood of confusion cannot be predicated on dissection of a mark, that is, on only part of a mark.”

To begin, the dominant portion of the Cited Mark is clearly the mortar and pestle design in connection with the term “NU”. See EXHIBIT 1.

TMEP 807.14(e)(ii) states:

“In a color design mark, the design portion is likely to be the most dominant portion of the mark in creating a commercial impression.”

The mortar and pestle design and the term “NU” is 75% larger than the term “VERUS”, as shown in EXHIBIT 1. Thus, the sheer size of the term “NU” and the mortar and pestle design impress a greater commercial impression on the consumer as opposed to the term “VERUS”.

Thus, when compared to Applicant’s Mark, the dominant portion of the mark “NU” with a mortar and pestle design is clearly different from the term NUTRIVERUS with the plant design, as demonstrated in EXHIBIT 1.

See TMEP 1207.01(b)(iii):

”Additions or deletions to marks may be sufficient to avoid a likelihood of confusion if: (1) the marks in their entireties convey significantly different commercial impressions; or (2) **the matter common to the marks is not likely to be perceived by purchasers as distinguishing source because it is merely descriptive or diluted.**”

The term “VERUS” is over 75% **smaller** than the remaining portion of the mark and is thus diluted and weaker in force. If the term “NU” or the mortar and pestle design were removed from the mark, the commercial impression would be greatly changed.

Unlike a word mark, which could take any form of design, the Cited Mark is tied to a design which means the term “VERUS” will **ALWAYS** be diluted and NU and the mortar and pestle design will **ALWAYS** be the most prominent and dominant portions of the mark, as demonstrated in EXHIBIT 1.

Further, the Examiner argues that "...for a composite mark containing both words and a design, the word portion may be more likely to be impressed upon a purchaser's memory..." and that the word portion of the marks, NU VERUS and NUTRIVERUS, are confusingly similar.

The Examiner states that the term "NUTRI" is descriptive. Applicant disagrees. The term NUTRIVERUS is suggestive and cannot be dissected into two terms, nor is one portion of the mark more dominant than the other.

As stated in the previous response's EXHIBIT B, the term "VERUS" represents a Roman Gladiator. Also stated in the previous response, the term "NUTRI" is a prefix. Applicant's previously submitted EXHIBIT A shows the definition of "NUTRI" to be "a prefix meaning nourishment". "Nourishment" is merely suggestive of the goods described in Applicant's mark, because "nourishment" does not have to refer to food and can be applied to other substances such as love, comfort, passion, care, compassion, or other such intangible nourishment of the soul or mind. See EXHIBIT 2. Thus, the prefix, "NUTRI" meaning "nourishment" is merely suggestive of the goods described, because it is not definable as one particular meaning.

The terms "NUTRI" and "VERUS" are combined to form a new word, "NUTRIVERUS" which is suggestive of the goods in that it fights for the health of the user.

TMEP 1209.01(a) states that:

"Incongruity is a strong indication that a mark is suggestive rather than merely descriptive. The Board has described incongruity in a mark as "one of the accepted guideposts in the evolved set of legal principles for discriminating the suggestive from the descriptive mark," and has noted that the concept of mere descriptiveness "should not penalize coinage of hitherto unused and somewhat incongruous word combinations whose import would not be grasped without some measure of imagination and 'mental pause.'" In re Shutts, 217 USPQ 363, 364-5 (TTAB 1983) (SNO-RAKE held not merely descriptive of a snow-removal hand tool); see also In re Vienna Sausage Mfg. Co., 156 USPQ 155, 156 (TTAB 1967) (FRANKWURST held not merely descriptive for wieners, the Board finding that although "frank" may be synonymous with "wiener," and "wurst" is synonymous with "sausage," the combination of the terms is incongruous and results in a mark that is no more than suggestive of the nature of the goods)."

Further, TMEP 1213.05(d) states that:

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The Examiner's argument that Applicant's mark contains "NUTRI" and therefore that portion of the mark is "descriptive" or "less significant" than the term "VERUS" is completely unfounded. "NUTRIVERUS" forms a new word, which creates an incongruity, and thus results in an overall suggestive trademark. Thus, the Examiner cannot easily discount the term "NUTRI".

Further, Applicant has presented the examiner with a list of trademarks for the same goods using the term "NUTRI". See Applicant's Previous EXHIBIT D (hereafter referred to as EXHIBIT D) from the April 14, 2015 office action response.

TMEP 1207.01(d)(iii) states:

"...third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services. *See, e.g., In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150, 1153-54 (TTAB 2012); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Dayco Products-Eagle Motive Inc.*, 9 USPQ2d 1910, 1911-12 (TTAB 1988); *Plus Prods. v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983)."

The marks in EXHIBIT D that contain the term NUTRI for supplements, vitamins and other health products do not disclaim the term "NUTRI" as being descriptive. This fact supports the Applicant's argument that NUTRI is a suggestive.

EXHIBIT D noted the coexistence of multiple marks containing "NU" and "NUTRI". These marks demonstrate peaceful coexistence of the terms "NU" and "NUTRI" with more than added suggestive/descriptive terms. The Examiner claims that "NUTRI" is descriptive. However, the Examiner boldly stated that the registered marks demonstrated in EXHIBIT D were:

"...the examples referenced by the applicant contain the term "NU/NUTRI" and are combined with highly suggestive/descriptive wording."

See TMEP 1207.01(d)(iii), as quoted above, where third party registrations may be relevant to show descriptive terms.

Applicant demonstrates that if “NUTRI” is in fact descriptive, as the Examiner suggests, and the marks shown in EXHIBIT D are combined with “descriptive” wording, the marks **would not** be registered on the Principal Register, as completely descriptive marks are thus prohibited. See 15 U.S.C. §1052(e)(1). **Thus, once again, NUTRI is clearly not descriptive, as evidently demonstrated by the Examiner.**

The fact remains that NUTRIVERUS forms a new word. The mark as a whole is suggestive, and could even be considered as fanciful. NUTRIVERUS is a fictitious term. See TMEP 1209.01(a) wherein it reads:

“Fanciful marks comprise **terms that have been invented for the sole purpose of functioning as a trademark or service mark**. Such marks comprise words that are either unknown in the language (e.g., PEPSI, KODAK, and EXXON) or are **completely out of common usage** (e.g., FLIVVER).”

The average consumer doesn’t go around naming off Roman gladiators (VERUS). NUTRIVERUS creates a new word solely created for the purpose of a trademark!

Regardless of the mark being suggestive or fanciful, the fact remains that “NUTRI” is not descriptive. **Thus, the mark cannot be divided into two words for the purpose of determining a dominant portion of the mark.**

Registrant willingly dissects their mark into two words “NU” and “VERUS”, as evidenced Registrant’s design itself. See Registrant’s description of the design wherein it states:

“The mark consists of the wording "NU" in green. The word "VERUS" is below the wording "NU", in the color white. The design of a mortar and pestle in the color green is to the left of the wording "NU VERUS", all on a black background.”

These words are completely separate and cannot be used to form a new word or an incongruity. The word “NU” represents a Greek letter or the letter “N”. Applicant’s mark is still distinct in that it creates a different connotation and commercial impression and is different from the words “NU” and “VERUS”.

Additionally, the Examiner states that the only difference between the marks is the addition of “TRI”. The fact that two marks use a written or phonetically common set of letters is not conclusive of a likelihood of confusion. See *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373,

1374-75 (Fed. Cir. 1998); see also Consolidated Cigar Corp. v. R.J. Reynolds Tobacco Co., 491 F.2d 1265, 1266-67 (C.C.P.A. 1974) (finding no likelihood of confusion between "DUTCH MASTERS" for cigars and "DUTCH APPLE" for tobacco); ConAgra, Inc. v. George A. Hormel & Co., 990 F.2d 368, 371 (8th Cir. 1993) (no likelihood of confusion between "HEALTHY CHOICE" and "HEALTH SELECTIONS," both for food products). In the Champagne case, the court upheld the Board's dismissal of an opposition to the mark "CRYSTAL CREEK" for wine by the owner of the mark "CRISTAL" for champagne. The court properly focused on the differences between the marks, i.e., the addition of the word "CREEK" to the applicant's mark. Id. As in Champagne (where no likelihood of confusion was found), one word comprises the sole similarity between the Cited Mark and Applicant's Mark and is insufficient to support a likelihood of confusion.

The Cited Mark also greatly differs in appearance from Applicant's Mark in that the Registrant has applied for not only a specific design mark, but a mark with a color claim. As stated above, the registration reads specifically:

"The mark consists of the wording "NU" in green. The word "VERUS" is below the wording "NU", in the color white. The design of a mortar and pestle in the color green is to the left of the wording "NU VERUS", all on a black background."

The mark's use is therefore limited to the green and black color design shown in the registration.

TMEP 807.14(e)(ii) discusses the following exception for marks that include color and other elements with respect to design marks:

"Exception – Color is the Dominant Portion of the Mark. Generally, if the color portion to be amended constitutes the dominant or most significant part of the entire mark, it becomes more likely that the proposed color amendment is a material alteration."

Further, TMEP 807.14(e)(ii) reads:

"Another factor to consider in assessing the dominance of the color element of the mark **is the size or prominence of the color design** or graphic element to be amended in proportion to the rest of the mark."

Registrant clearly claims that the design of the mark is to appear on a black background. Applicant submits that the color black is a dominant feature of the mark, as the “background” is the largest portion of the mark. **The “background” has not been limited to size.** Registrant’s own specimen of the mark demonstrates how the background is endless. See EXHIBIT 3. The black background is quite prominent and dominant in comparison to the words “NU” and “VERUS”.

Therefore, the overall look and appearance of the Cited Mark is considerably different than Applicant’s Mark. Applicant submits that since the Cited Mark is limited to the specific design as demonstrated by the registration, a consumer would not confuse the word portions of the cited amark, “NU” and “VERUS” with the Applicant’s Mark due to the dominant placement of the term “NU” with the mortar and pestle design along with the overall blanketed background color of black. The design and color of the NU VERUS & Design mark as a whole is not confusingly similar to the mark NUTRIVERUS & Design.

Examiner notes that the cited mark and Applicant’s mark both begin with “NU” and end with “VERUS”. However, the “TRI” in Applicant’s mark adds a syllable when spoken allowed, making the marks considerably different in sound. Also, as stated earlier, NUTRIVERUS mark forms an entire, whole, new word which can be simply defined as “fighting nutrition” based on the prefix “NUTRI” followed by the Roman gladiator, a person defending or opposing a cause (EXHIBIT B), “VERUS”. The cited mark does not form a new word in that “NU” is a Greek mathematical symbol and does not create a new word when added to the word “VERUS”.

TMEP 1207.01(b)(i) states:

The points of comparison for a **word mark** are appearance, sound, meaning, and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (citing *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)). **Similarity of the marks in one respect – sight, sound, or meaning – will not automatically result in a determination that confusion is likely even if the goods are identical or closely related; rather, taking into account all of the relevant facts of a particular case**, similarity as to one factor alone *may* be sufficient to support a holding that the marks are confusingly similar. *See In re Thor Tech, Inc.*, 90 USPQ2d 1634, 1635 (TTAB 2009); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

The Examiner is focused on the marks as if they were both word marks, when in fact, they are design marks. The previous paragraphs demonstrate how the Examiner is not taking in to account ALL the

relevant facts and differences between the marks.

Further, the Examiner's attention is drawn to EXHIBIT D once again. The number and nature of similar marks in use on similar goods/services (see TMEP §1207.01(d)(iii)), may also be relevant in an ex parte likelihood-of-confusion determination and must be considered if there is pertinent evidence in the record. To quote:

” Evidence of third-party use falls under the sixth *du Pont* factor – the “number and nature of similar marks in use on similar goods.” *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973).

Thus, the Examiner cannot so easily dismiss Applicant's previously submitted EXHIBIT D.

Regardless, several of the marks coexist **with fanciful and arbitrary** terms:

NUBEARS – 3,698,558

Class 5: dietary and nutritional supplements

NUTRI BEAR – 4,587,731

Class 5: nutritional supplements; vitamins

NUTRIGREEN – 3,616,044

Class 5: Chinese traditional medicine health supplements; herbal supplements for medicinal purposes

NU-GREENS – 3,714,521

Class 5: Dietary and nutritional supplements; Dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes; Dietary supplemental drinks; Meal replacement and dietary supplement drink mixes; Nutritional supplements; Powdered nutritional supplement drink mix

NUTRISOURCE – 1,228,109

Class 5: dietary food supplements

NU-SOURCE – 3,686,026

Class 5: dietary and nutritional supplements

NUTRITEK – 747,696

Class 46: partially demineralized dried whey for humans

NU-TEK – 3,795,760

Class 5: dietary food supplements; dietary supplements; nutritional supplements; sports nutritional supplements; vitamins; and weight loss supplements

NUONCE – 4,042,990

Class 5: dietary and nutritional supplements

NUTRI-ONE VITAMINS SUPPLEMENTS SMOOTHIES & Design – 4,623,240

Class 5: retail store services featuring vitamin supplements and sport nutrition

The Examiner claims that the marks at issue “share the very similar wording ‘NU’/‘NUTRI’ combined with the common identical *arbitrary* wording “VERUS”. **However, these principal registered marks also share common identical arbitrary wording.** Again, these marks demonstrate how marks using “NU” and “NUTRI” along with a common element with the same goods or in an identical channel of goods can PEACEFULLY coexist. The practice of the Trademark Office in registering these marks underscores the fact that the terms Applicant’s Mark and the Cited Mark are dissimilar.

Again, Applicant submits that since all of these marks coexist (some of the demonstrated marks have coexisted over 20 years), it is possible for Applicant’s Mark and the Cited Mark to also peacefully coexist. Applicant has been using their mark in the market place since April 12, 2012. Thus, Applicant’s Mark has been peacefully coexisting with the Cited Mark, without any customer confusion, for over three years.

The goods of the respective parties travel in different channels of trade. In making a likelihood of confusion determination, the goods are compared to determine whether they are similar or related or whether the activities surrounding their marketing are such that confusion as to origin is likely. *In re National Novice Hockey League, Inc.*, 222 U.S.P.Q. 638 (T.T.A.B. 1984).

Applicant only distributes their products through a multi-level marketing program. Thus, a consumer

cannot purchase the products without communication through an authorized sales distributor of the Applicant. Auction and reseller sites, such as E-Bay and Amazon, are diligently monitored by Applicant to ensure products are not being sold. Thus, it is difficult for a consumer to confuse the source of the goods, as sales of goods containing the NUTRIVERUS mark are closely monitored. Therefore, consumers would not assume that the goods come from a common source as they could not be marketed and sold together and/or in the same channels of trade. Therefore, Applicant submits that their respective channels of trade are dissimilar.

The Applicant's goods are specifically designed for sale by independent distributors and company sponsors. As such, the Applicant's goods are specifically procured by companies and business people seeking to specifically market and educate consumers of the product. Registrant's website also suggests that NuVerus is a multi-level marketing program. See EXHIBIT 4. The Applicant's and Registrant's distributors/sponsors specifically educate and market their products to their consumers. Therefore, the goods would never appear side by side on a store shelf. Nor would either company's goods appear for sale with the multitude of samples from retailers. Multi-level marketing programs are so extremely different from other channels of trade in that there is greater care in distinguishing the source of goods. Thus, avoidance of any confusion by consumers is inherent.

Second, the conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing also plays a determining factor in the conclusion that the marks are dissimilar. The sophistication of purchasers, coupled with the expense of the goods and care that purchasers exercise in selecting the particular goods, can reduce the likelihood of confusion and result in the registration of what otherwise might be similar marks. See *In re Digirad Corp.*, 45 U.S.P.Q.2d 1841, 1844 (T.T.A.B. 1998) ("DIGIRAY" and "DIGIRAD" not likely to be confused, primarily due to sophistication of consumers and care that consumers displayed in purchasing goods); *Electronic Design & Sales, Inc. v. Electronic Data Sys. Corp.*, 954 F.2d 713, 717 (C.C.P.A. 1992) ("EDS" and "E.D.S." not likely to cause confusion due primarily to sophistication of purchasers and care with which consumers purchase both parties' goods).

Again, as each party sells their respective goods through distributors/sponsors via a multi-level marketing program, consumers are well educated in the source of the goods as well as the product lines prior to making a purchase. The decision to purchase these goods is not made in haste, thus greatly reducing the likelihood of confusion. The procurement of these types of goods requires considerable thought, research and deliberation as the consumer is making a conscious effort to improve their health.

In conclusion, Applicant submits that the marks are different in sight, sound, connotation, commercial impression, channels of trade, sophistication of purchasers, coexistence of subject marks, and that the number and nature of similar marks containing "NU" and "NUTRI" with identical goods demonstrates peaceful coexistence. Thus, Applicant respectfully requests that the Examining Attorney reconsider the

refusal to register, and that the Application be allowed to proceed to publication. Should the Examiner continue refusal, Applicant requests early notification and entry of the exhibits in order to file the necessary appeal brief prior to the expiration of the deadline set forth by the Trademark Trial and Appeal Board.

EVIDENCE SECTION

EVIDENCE FILE NAME(S)

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| ORIGINAL PDF FILE | evi_1-72649062-20151113184314913708_.EXHIBIT_2.pdf |
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| CONVERTED PDF FILE(S) (1 page) | \\TICRS\EXPORT16\IMAGEOUT16\864\473\86447383\xml11\RFR0005.JPG |
| DESCRIPTION OF EVIDENCE FILE | EXHIBIT 1: Design elements for NU VERUS & Design Trademark Registration No. 3,774,292 and NUTRIVERUS & Design Trademark Application No. 86/447,383 EXHIBIT 2: Print of Dictionary.com's definitions of "nourishment"; Unabridged Based on the Random House Dictionary, © Random House, Inc. 2014.; Collins English Dictionary - Complete & Unabridged 10th Edition 2009 © William Collins Sons & Co. Ltd. 1979, 1986 © HarperCollins Publishers 1998, 2000, 2003, 2005, 2006, 2007, 2009 ; The American Heritage(R) Stedman's Medical Dictionary Copyright © 2002, 2001, 1995 by Houghton Mifflin Company. Published by Houghton Mifflin Company; printed February 24, 2014 EXHIBIT 3: U.S. Registration No. 3774292 - Specimen of Use from Application filing date June 3, 2009 EXHIBIT 4: Screenshot of NuVerus, LLC website |

SIGNATURE SECTION

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|-----------------------------|--|
| RESPONSE SIGNATURE | /Sanford E. Warren, Jr./ |
| SIGNATORY'S NAME | Sanford E. Warren, Jr. |
| SIGNATORY'S POSITION | Attorney for Applicant, Texas Bar Member |

| | |
|---------------------------------------|--|
| SIGNATORY'S PHONE NUMBER | 972-550-2955 |
| DATE SIGNED | 11/13/2015 |
| AUTHORIZED SIGNATORY | YES |
| CONCURRENT APPEAL NOTICE FILED | YES |
| FILING INFORMATION SECTION | |
| SUBMIT DATE | Fri Nov 13 19:08:29 EST 2015 |
| TEAS STAMP | USPTO/RFR-72.64.90.62-201 51113190829662470-8644738 3-540e186a86c475d1a7f6b59 35b4ff7a3b2c58906fe21b36f bf7c022109c424abf-N/A-N/A -20151113184314913708 |

PTO Form 1960 (Rev 9/2007)
OMB No. 0651-0050 (Exp. 07/31/2017)

Request for Reconsideration after Final Action To the Commissioner for Trademarks:

Application serial no. **86447383** NUTRIVERUS (Stylized and/or with Design, see <http://tmng-al.uspto.gov/resting2/api/img/86447383/large>) has been amended as follows:

ARGUMENT(S)

In response to the substantive refusal(s), please note the following:

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Further, Applicant has presented the examiner with a list of trademarks for the same goods using the term “NUTRI”. See Applicant’s Previous EXHIBIT D (hereafter referred to as EXHIBIT D) from the April 14, 2015 office action response.

TMEP 1207.01(d)(iii) states:

“...third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, or so commonly used that the public will look to other elements to distinguish the source of the goods or services. *See, e.g., In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150, 1153-54 (TTAB 2012); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *In re Dayco Products-Eagle Motive Inc.*, 9 USPQ2d 1910, 1911-12 (TTAB 1988); *Plus Prods. v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983).”

The marks in EXHIBIT D that contain the term NUTRI for supplements, vitamins and other health products do not disclaim the term “NUTRI” as being descriptive. This fact supports the Applicant’s argument that NUTRI is a suggestive.

EXHIBIT D noted the coexistence of multiple marks containing “NU” and “NUTRI”. These marks demonstrate peaceful coexistence of the terms “NU” and “NUTRI” with more than added suggestive/descriptive terms. The Examiner claims that “NUTRI” is descriptive. However, the Examiner boldly stated that the registered marks demonstrated in EXHIBIT D were:

“...the examples referenced by the applicant contain the term “NU/NUTRI” and are combined with highly suggestive/descriptive wording.”

See TMEP 1207.01(d)(iii), as quoted above, where third party registrations may be relevant to show descriptive terms.

Applicant demonstrates that if “NUTRI” is in fact descriptive, as the Examiner suggests, and the marks shown in EXHIBIT D are combined with “descriptive” wording, the marks **would not** be registered on the Principal Register, as completely descriptive marks are thus prohibited. See 15 U.S.C. §1052(e)(1). **Thus, once again, NUTRI is clearly not descriptive, as evidently demonstrated by the Examiner.**

The fact remains that NUTRIVERUS forms a new word. The mark as a whole is suggestive, and could even be considered as fanciful. NUTRIVERUS is a fictitious term. See TMEP 1209.01(a) wherein it reads:

“Fanciful marks comprise **terms that have been invented for the sole purpose of functioning as a trademark or service mark.** Such marks comprise words that are either unknown in the language (e.g., PEPSI, KODAK, and EXXON) or are **completely out of common usage** (e.g., FLIVVER).”

The average consumer doesn’t go around naming off Roman gladiators (VERUS). NUTRIVERUS creates a new word solely created for the purpose of a trademark!

Regardless of the mark being suggestive or fanciful, the fact remains that “NUTRI” is not descriptive. **Thus, the mark cannot be divided into two words for the purpose of determining a dominant portion of the mark.**

Registrant willingly dissects their mark into two words “NU” and “VERUS”, as evidenced Registrant’s design itself. See Registrant’s description of the design wherein it states:

“The mark consists of the wording "NU" in green. The word "VERUS" is below the wording "NU", in the color white. The design of a mortar and pestle in the color green is to the left of the wording "NU VERUS", all on a black background.”

These words are completely separate and cannot be used to form a new word or an incongruity. The word

“NU” represents a Greek letter or the letter “N”. Applicant’s mark is still distinct in that it creates a different connotation and commercial impression and is different from the words “NU” and “VERUS”.

Additionally, the Examiner states that the only difference between the marks is the addition of “TRI”. The fact that two marks use a written or phonetically common set of letters is not conclusive of a likelihood of confusion. See *Champagne Louis Roederer, S.A. v. Delicato Vineyards*, 148 F.3d 1373, 1374-75 (Fed. Cir. 1998); see also *Consolidated Cigar Corp. v. R.J. Reynolds Tobacco Co.*, 491 F.2d 1265, 1266-67 (C.C.P.A. 1974) (finding no likelihood of confusion between "DUTCH MASTERS" for cigars and "DUTCH APPLE" for tobacco); *ConAgra, Inc. v. George A. Hormel & Co.*, 990 F.2d 368, 371 (8th Cir. 1993) (no likelihood of confusion between "HEALTHY CHOICE" and "HEALTH SELECTIONS," both for food products). In the Champagne case, the court upheld the Board's dismissal of an opposition to the mark "CRYSTAL CREEK" for wine by the owner of the mark "CRISTAL" for champagne. The court properly focused on the differences between the marks, i.e., the addition of the word "CREEK" to the applicant's mark. *Id.* As in Champagne (where no likelihood of confusion was found), one word comprises the sole similarity between the Cited Mark and Applicant's Mark and is insufficient to support a likelihood of confusion.

The Cited Mark also greatly differs in appearance from Applicant’s Mark in that the Registrant has applied for not only a specific design mark, but a mark with a color claim. As stated above, the registration reads specifically:

“The mark consists of the wording "NU" in green. The word "VERUS" is below the wording "NU", in the color white. The design of a mortar and pestle in the color green is to the left of the wording "NU VERUS", all on a black background.”

The mark’s use is therefore limited to the green and black color design shown in the registration.

TMEP 807.14(e)(ii) discusses the following exception for marks that include color and other elements with respect to design marks:

“Exception – Color is the Dominant Portion of the Mark. Generally, if the color portion to be amended constitutes the dominant or most significant part of the entire mark, it becomes more likely that the proposed color amendment is a material alteration.”

Further, TMEP 807.14(e)(ii) reads:

“Another factor to consider in assessing the dominance of the color element of the mark **is the size or prominence of the color design** or graphic element to be amended in proportion to the rest of the mark.”

Registrant clearly claims that the design of the mark is to appear on a black background. Applicant submits that the color black is a dominant feature of the mark, as the “background” is the largest portion of the mark. **The “background” has not been limited to size.** Registrant’s own specimen of the mark demonstrates how the background is endless. See EXHIBIT 3. The black background is quite prominent and dominant in comparison to the words “NU” and “VERUS”.

Therefore, the overall look and appearance of the Cited Mark is considerably different than Applicant’s Mark. Applicant submits that since the Cited Mark is limited to the specific design as demonstrated by the registration, a consumer would not confuse the word portions of the cited mark, “NU” and “VERUS” with the Applicant’s Mark due to the dominant placement of the term “NU” with the mortar and pestle design along with the overall blanketed background color of black. The design and color of the NU VERUS & Design mark as a whole is not confusingly similar to the mark NUTRIVERUS & Design.

Examiner notes that the cited mark and Applicant’s mark both begin with “NU” and end with “VERUS”. However, the “TRI” in Applicant’s mark adds a syllable when spoken aloud, making the marks considerably different in sound. Also, as stated earlier, NUTRIVERUS mark forms an entire, whole, new word which can be simply defined as “fighting nutrition” based on the prefix “NUTRI” followed by the Roman gladiator, a person defending or opposing a cause (EXHIBIT B), “VERUS”. The cited mark does not form a new word in that “NU” is a Greek mathematical symbol and does not create a new word when added to the word “VERUS”.

TMEP 1207.01(b)(i) states:

The points of comparison for a **word mark** are appearance, sound, meaning, and commercial impression. *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée en 1772*, 396 F.3d 1369, 1371, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (citing *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973)). **Similarity of the marks in one respect – sight, sound, or meaning – will not automatically result in a determination that confusion is likely even if the goods are identical or closely related; rather, taking into account all of the relevant facts of a particular case**, similarity as to one factor alone may be sufficient to support a holding that the marks are confusingly similar. *See In re Thor Tech, Inc.*, 90

USPQ2d 1634, 1635 (TTAB 2009); *In re White Swan Ltd.*, 8 USPQ2d 1534, 1535 (TTAB 1988).

The Examiner is focused on the marks as if they were both word marks, when in fact, they are design marks. The previous paragraphs demonstrate how the Examiner is not taking in to account ALL the relevant facts and differences between the marks.

Further, the Examiner's attention is drawn to EXHIBIT D once again. The number and nature of similar marks in use on similar goods/services (see TMEP §1207.01(d)(iii)), may also be relevant in an ex parte likelihood-of-confusion determination and must be considered if there is pertinent evidence in the record. To quote:

” Evidence of third-party use falls under the sixth *du Pont* factor – the “number and nature of similar marks in use on similar goods.” *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 1361, 177 USPQ 563, 567 (C.C.P.A. 1973).

Thus, the Examiner cannot so easily dismiss Applicant's previously submitted EXHIBIT D.

Regardless, several of the marks coexist **with fanciful and arbitrary** terms:

NUBEARS – 3,698,558

Class 5: dietary and nutritional supplements

NUTRI BEAR – 4,587,731

Class 5: nutritional supplements; vitamins

NUTRIGREEN – 3,616,044

Class 5: Chinese traditional medicine health supplements; herbal supplements for medicinal purposes

NU-GREENS – 3,714,521

Class 5: Dietary and nutritional supplements; Dietary beverage supplements for human consumption in liquid and dry mix form for therapeutic purposes; Dietary supplemental drinks; Meal replacement and dietary supplement drink mixes; Nutritional supplements; Powdered nutritional supplement drink mix

NUTRISOURCE – 1,228,109

Class 5: dietary food supplements

NU-SOURCE – 3,686,026

Class 5: dietary and nutritional supplements

NUTRITEK – 747,696

Class 46: partially demineralized dried whey for humans

NU-TEK – 3,795,760

Class 5: dietary food supplements; dietary supplements; nutritional supplements; sports nutritional supplements; vitamins; and weight loss supplements

NUONCE – 4,042,990

Class 5: dietary and nutritional supplements

NUTRI-ONE VITAMINS SUPPLEMENTS SMOOTHIES & Design – 4,623,240

Class 5: retail store services featuring vitamin supplements and sport nutrition

The Examiner claims that the marks at issue “share the very similar wording ‘NU’/‘NUTRI’ combined with the common identical *arbitrary* wording ‘VERUS’”. **However, these principal registered marks also share common identical arbitrary wording.** Again, these marks demonstrate how marks using “NU” and “NUTRI” along with a common element with the same goods or in an identical channel of goods can PEACEFULLY coexist. The practice of the Trademark Office in registering these marks underscores the fact that the terms Applicant’s Mark and the Cited Mark are dissimilar.

Again, Applicant submits that since all of these marks coexist (some of the demonstrated marks have coexisted over 20 years), it is possible for Applicant’s Mark and the Cited Mark to also peacefully coexist. Applicant has been using their mark in the market place since April 12, 2012. Thus, Applicant’s Mark has been peacefully coexisting with the Cited Mark, without any customer confusion, for over three years.

The goods of the respective parties travel in different channels of trade. In making a likelihood of

confusion determination, the goods are compared to determine whether they are similar or related or whether the activities surrounding their marketing are such that confusion as to origin is likely. *In re* National Novice Hockey League, Inc., 222 U.S.P.Q. 638 (T.T.A.B. 1984).

Applicant only distributes their products through a multi-level marketing program. Thus, a consumer cannot purchase the products without communication through an authorized sales distributor of the Applicant. Auction and reseller sites, such as E-Bay and Amazon, are diligently monitored by Applicant to ensure products are not being sold. Thus, it is difficult for a consumer to confuse the source of the goods, as sales of goods containing the NUTRIVERUS mark are closely monitored. Therefore, consumers would not assume that the goods come from a common source as they could not be marketed and sold together and/or in the same channels of trade. Therefore, Applicant submits that their respective channels of trade are dissimilar.

The Applicant's goods are specifically designed for sale by independent distributors and company sponsors. As such, the Applicant's goods are specifically procured by companies and business people seeking to specifically market and educate consumers of the product. Registrant's website also suggests that NuVerus is a multi-level marketing program. See EXHIBIT 4. The Applicant's and Registrant's distributors/sponsors specifically educate and market their products to their consumers. Therefore, the goods would never appear side by side on a store shelf. Nor would either company's goods appear for sale with the multitude of samples from retailers. Multi-level marketing programs are so extremely different from other channels of trade in that there is greater care in distinguishing the source of goods. Thus, avoidance of any confusion by consumers is inherent.

Second, the conditions under which and buyers to whom sales are made, i.e., "impulse" vs. careful, sophisticated purchasing also plays a determining factor in the conclusion that the marks are dissimilar. The sophistication of purchasers, coupled with the expense of the goods and care that purchasers exercise in selecting the particular goods, can reduce the likelihood of confusion and result in the registration of what otherwise might be similar marks. See *In re* Digirad Corp., 45 U.S.P.Q.2d 1841, 1844 (T.T.A.B. 1998) ("DIGIRAY" and "DIGIRAD" not likely to be confused, primarily due to sophistication of consumers and care that consumers displayed in purchasing goods); *Electronic Design & Sales, Inc. v. Electronic Data Sys. Corp.*, 954 F.2d 713, 717 (C.C.P.A. 1999) ("EDS" and "E.D.S." not likely to cause confusion due primarily to sophistication of purchasers and care with which consumers purchase both parties' goods).

Again, as each party sells their respective goods through distributors/sponsors via a multi-level marketing program, consumers are well educated in the source of the goods as well as the product lines prior to making a purchase. The decision to purchase these goods is not made in haste, thus greatly reducing the likelihood of confusion. The procurement of these types of goods requires considerable thought, research and deliberation as the consumer is making a conscious effort to improve their health.

In conclusion, Applicant submits that the marks are different in sight, sound, connotation, commercial impression, channels of trade, sophistication of purchasers, coexistence of subject marks, and that the number and nature of similar marks containing “NU” and “NUTRI” with identical goods demonstrates peaceful coexistence. Thus, Applicant respectfully requests that the Examining Attorney reconsider the refusal to register, and that the Application be allowed to proceed to publication. Should the Examiner continue refusal, Applicant requests early notification and entry of the exhibits in order to file the necessary appeal brief prior to the expiration of the deadline set forth by the Trademark Trial and Appeal Board.

EVIDENCE

Evidence in the nature of EXHIBIT 1: Design elements for NU VERUS & Design Trademark Registration No. 3,774,292 and NUTRIVERUS & Design Trademark Application No. 86/447,383 EXHIBIT 2: Print of Dictionary.com's definitions of "nourishment"; Unabridged Based on the Random House Dictionary, © Random House, Inc. 2014.; Collins English Dictionary - Complete & Unabridged 10th Edition 2009 © William Collins Sons & Co. Ltd. 1979, 1986 © HarperCollins Publishers 1998, 2000, 2003, 2005, 2006, 2007, 2009 ; The American Heritage(R) Stedman's Medical Dictionary Copyright © 2002, 2001, 1995 by Houghton Mifflin Company. Published by Houghton Mifflin Company; printed February 24, 2014 EXHIBIT 3: U.S. Registration No. 3774292 - Specimen of Use from Application filing date June 3, 2009 EXHIBIT 4: Screenshot of NuVerus, LLC website has been attached.

JPG file(s):

[Evidence-1](#)

Original PDF file:

[evi_1-72649062-20151113184314913708 . EXHIBIT 1.pdf](#)

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SIGNATURE(S)

Request for Reconsideration Signature

Signature: /Sanford E. Warren, Jr./ Date: 11/13/2015

Signatory's Name: Sanford E. Warren, Jr.

Signatory's Position: Attorney for Applicant, Texas Bar Member

Signatory's Phone Number: 972-550-2955

The signatory has confirmed that he/she is an attorney who is a member in good standing of the bar of the highest court of a U.S. state, which includes the District of Columbia, Puerto Rico, and other federal territories and possessions; and he/she is currently the owner's/holder's attorney or an associate thereof; and to the best of his/her knowledge, if prior to his/her appointment another U.S. attorney or a Canadian

attorney/agent not currently associated with his/her company/firm previously represented the owner/holder in this matter: (1) the owner/holder has filed or is concurrently filing a signed revocation of or substitute power of attorney with the USPTO; (2) the USPTO has granted the request of the prior representative to withdraw; (3) the owner/holder has filed a power of attorney appointing him/her in this matter; or (4) the owner's/holder's appointed U.S. attorney or Canadian attorney/agent has filed a power of attorney appointing him/her as an associate attorney in this matter.

The applicant is filing a Notice of Appeal in conjunction with this Request for Reconsideration.

Serial Number: 86447383

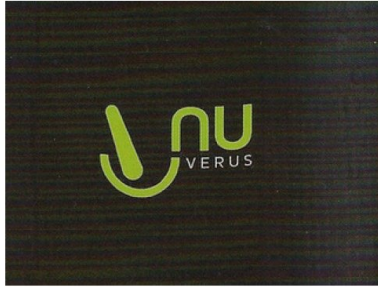
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nour-ish [nur-ish, nuhr-] Show IPA

verb (used with object)

- to sustain with food or nutriment; supply with what is necessary for life, health, and growth.
- to cherish, foster, keep alive, etc.: *He had long nourished the dream of living abroad.*
- to strengthen, build up, or promote: *to nourish discontent among the workers; to nourish the arts in one's community.*

Origin:

1250-1300; Middle English *norisshe* < Old French *noriss-*, long stem of *norir* < Latin *nūtrīre* to feed; see nurse, -ish²

Related forms

nour-ish-a-ble, adjective
nour-ish-er, noun
o-ver-nour-ish, verb (used with object)
re-nour-ish, verb (used with object)
self-nour-ish-ed, adjective

Example sentences

But somehow, the inability to **nourish** oneself seems different.
Deadly call and response recruits stem cells to **nourish** ticking tumors.
Such fertilizers are named according to the plant they're intended to **nourish**.
It's a quality one must foster and **nourish** if profits are to be made.



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Synonyms

- See nurse.
- encourage, help, aid, back, advance.

Antonyms

- discourage.

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Relevant Questions

World English Dictionary

Collins

nourish (ˈnʌrɪʃ)

— vb

- to provide with the materials necessary for life and growth
- to support or encourage (an idea, feeling, etc); foster: *to nourish resentment*

[C14: from Old French *norir*, from Latin *nūtrīre* to feed, care for]

'nourisher

— n

'nourishing

— adj

'nourishingly

— adv

Related Words

| | |
|--------------|--------------|
| nurse | fond |
| foster | irrigate |
| altricial | malnourished |
| choroid coat | nourishment |
| coalesce | nurture |
| coalition | nutrient |

MORE

Matching Quote

"Short is the glory of the blushing rose,
The hue which thou so carefully dost
nourish,
Yet which at length thou must be forced
to lose."

-Samuel Daniel

MORE



Collins English Dictionary - Complete & Unabridged 10th Edition
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Word Origin & History

Etymonline

nourish

late 13c., "to bring up, nurture" (a child, a feeling, etc.), from O.Fr. norriss-, stem of norrir (Fr. nourir), from L. nutrire "to feed, nurse, foster, support, preserve," from *nutri (older form of nutrix "nurse"), lit. "she who gives suck," from PIE base *(s)nu- "flow, let flow," hence "to suckle"

Online Etymology Dictionary, © 2010 Douglas Harper
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Medical Dictionary

American Heritage

nourish nour-ish (nŭr'ish, nŭr'-)

v. **nour-ish-ed** , **nour-ish-ing** , **nour-ish-es**

To provide with food or other substances necessary for sustaining life and growth.

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